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For participants only

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International Law Commission
Seventieth session (second part)

Provisional summary record of the 3442nd meeting
Held at the Palais des Nations, Geneva, on Thursday, 2 August 2018, at 3 p.m.

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Present:

Chair:	Mr. Valencia-Ospina
Members:	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission

The meeting was called to order at 3 p.m.

Draft report of the Commission on the work of its seventieth session (*continued*)

Chapter V. Identification of customary international law (*continued*) (A/CN.4/L.918 and A/CN.4/L.918/Add.1)

The Chair invited the Commission to resume its consideration of the portion of chapter V contained in document A/CN.4/L.918/Add.1.

Commentary to draft conclusion 6 (Forms of practice)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Tladi proposed that, in the second sentence, the second occurrence of the word "may" should be replaced with "does", as an act would count as practice once it had been identified as verbal conduct.

Mr. Murphy said that, in various parts of the project, a distinction was drawn between *opinio juris* and practice in relation to what States "said". For that reason, he was not sure that it could be said that verbal conduct counted as practice in all instances.

Mr. Nolte said that he tended to agree with Mr. Murphy. Verbal conduct counted as practice in the sense of customary international law in some instances, but not in all. It would therefore be more prudent to retain the original text.

Mr. Tladi said that he did not share Mr. Nolte's view. It would be interesting to learn of an example of an identified instance of verbal conduct that did not count as practice. Verbal conduct did not contribute to the formation of customary international law in all instances, but nor did other forms of practice.

Mr. Rajput said that the original text was the most appropriate. The use of the word "may" made clear that the Commission was not providing a definitive list of what counted as practice.

Mr. Saboia said that he could see the merit of Mr. Tladi's proposal. The last sentence of the paragraph stated that practice could at times consist entirely of verbal acts.

Mr. Hmoud proposed that, as a solution, the word "also" should be inserted after the second occurrence of the word "may".

Mr. Grossman Guiloff said that he found the distinction drawn in the paragraph between what States "did" and what they "said" problematic. It was not clear on what basis that distinction rested. What a State "did" and what it "said" could both surely count as practice. In that connection, he recalled the important role of unilateral statements of States in the formation of international norms.

Mr. Nolte said that he was prepared to go along with Mr. Hmoud's proposal. With regard to Mr. Grossman Guiloff's point, it could indeed be argued that "doing" and "saying" existed on a single continuum, and the theory of "speech acts" involved the collapse of the distinction between the two. It nevertheless remained necessary in the context of the topic to distinguish between serious speech acts and non-serious speech acts and, for that reason, he was in favour of retaining the word "may".

Mr. Grossman Guiloff said that the existence of the relevant *opinio juris* would determine whether a particular instance of verbal conduct counted as practice. Non-serious speech would not usually reflect an *opinio juris*. In his view, there was no legal or theoretical basis for such a tentative approach towards verbal conduct. He would not labour the point, but he nevertheless wished it to be noted that, in his view, written verbal conduct was itself a form of "doing". In any case, the original text had been carefully formulated.

Mr. Tladi said that his proposal to replace the word "may" with "does" would not create the impression that the Commission was providing a definitive list of what counted as practice. Mr. Nolte's comments confirmed to him that the Commission was in effect establishing a hierarchy among the various forms of conduct. Mr. Hmoud's proposal did not address his concerns.

Sir Michael Wood (Special Rapporteur) said that draft conclusion 6 was part of the section on general practice and not that on *opinio juris*. It was a response to old theories according to which only physical acts counted as practice. The Commission was asserting that verbal acts could also constitute practice. However, it was not the case that all statements counted as practice for the purposes of identifying customary international law. For that reason, he would support Mr. Hmoud's proposal.

Mr. Grossman Guiloff said that it was also the case that not everything that a State "did" counted as practice.

Paragraph (2), as amended by Mr. Hmoud, was adopted.

Paragraph (3)

Mr. Nolte, referring to the first part of the second sentence, said that it would be more appropriate to use the word "conscious" than "deliberate", as it would set a lower threshold for proving the existence of a particular rule of customary international law. In order to avoid a lengthy debate on the issue and in the interest of finding a compromise solution agreeable to all members, he proposed that the Commission should use the two words interchangeably and should insert the word "conscious", in brackets, immediately after the first occurrence of the word "deliberate". Both words were already used in the part of the sentence that followed the colon. He recalled that the Commission had decided not to use the word "deliberate" in the text of the draft conclusion itself.

Mr. Rajput said that an explanation of the Commission's interpretation of the word "deliberate" was given in the text that followed the colon in the second sentence.

Mr. Saboia said that he supported Mr. Nolte's proposal, which represented a good compromise. He had already commented on the word "deliberate" in his statement in the plenary.

Mr. Tladi said that he agreed with Mr. Rajput. He had a different recollection of the debate in the plenary and the discussion in the Drafting Committee. He seemed to recall that most Commission members had expressed a clear preference for the word "deliberate". In addition, as had been discussed in the Working Group on working methods, it was important that the Commission paid special attention to the views of States. In their written submissions on the topic, States had given a clear indication that the Commission should express the idea that an action had to be deliberate in order to count as practice. For that reason, he supported the original text.

Mr. Reinisch said that he supported Mr. Nolte's compromise proposal. There had been considerable debate in the Commission regarding the use of the word "deliberate". He seemed to recall that the decision not to use that word had itself been a deliberate and not merely a conscious one.

Mr. Park said that, as far as he recalled, some States had insisted that the word "deliberate" should be inserted before the word "abstention". The question of how to determine whether a particular instance of abstention was deliberate had been considered in the plenary and in the Drafting Committee. In his view, Mr. Nolte's proposal would create confusion.

Mr. Murphy said that the Commission had discussed the word "deliberate" in some detail. The inclusion of that word served to make the important point that not all instances of abstention from acting counted as practice. He was not persuaded by Mr. Nolte's point regarding proof. Whether the Commission used the word "deliberate" or the word "conscious", it would still be making clear that there was a certain threshold that had to be met in that regard. In addition, if Mr. Nolte's proposal hinged on a distinction between

those two words, he could not see the purpose of presenting them as synonymous. In his view, the original text made the Commission's position clear.

Ms. Oral said that there was little difference in meaning between the words "deliberate" and "conscious". In addition, they had both already been used in the paragraph. She would be in favour of retaining the original text.

Mr. Rajput said that Mr. Park's comment echoed the 2018 statement of the Chair of the Drafting Committee. Indeed, the text that appeared after the colon in the second sentence reflected the language used in the statement of the Chair of the Drafting Committee. In his view, the original text of the paragraph should be retained.

Sir Michael Wood (Special Rapporteur) said that, for the reasons given by other Commission members, his preference would be to retain the original text.

Paragraph (3) was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

Paragraph (6)

Mr. Tladi proposed that the language in the second half of the first sentence should be strengthened through the replacement of the words "are unlikely to be considered relevant" with "are not to be taken into account".

Sir Michael Wood (Special Rapporteur) said that, although he was prepared to accept a proposal to strengthen the language used in the first sentence, the formulation proposed by Mr. Tladi was too absolute in nature. To use the example of England, if a decision of the High Court had been overruled by a decision of the Court of Appeal and that second decision had in turn been overruled by a decision of the Supreme Court, it was possible that the original decision of the High Court would continue to be relevant. As a less absolute alternative, he proposed that the words "are unlikely to be considered relevant" should be replaced with "are generally not considered relevant".

Mr. Nolte said that another solution would be to insert the word "very" before "unlikely".

Mr. Tladi said that he preferred the language proposed by the Special Rapporteur.

Paragraph (6), as amended by the Special Rapporteur, was adopted.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

The commentary to draft conclusion 6 as a whole, as amended, was adopted.

Commentary to draft conclusion 7 (Assessing a State's practice)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

Sir Michael Wood (Special Rapporteur) proposed that the words "the 'general practice' element" should be replaced with "'a general practice'".

Paragraph (4), as amended, was adopted.

Paragraph (5)

Sir Michael Wood (Special Rapporteur) proposed that, in the third sentence, the words "In this vein, for example" should be replaced with "Thus".

Paragraph (5), as amended, was adopted.

The commentary to draft conclusion 7 as a whole, as amended, was adopted.

Commentary to draft conclusion 8 (The practice must be general)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Park said that the meaning of the word "timing" in the second sentence of footnote 51 was unclear; he wondered whether replacing it with the word "duration" might clarify the meaning.

Sir Michael Wood (Special Rapporteur) said that the second sentence had not been intended to refer to the duration of the practice but rather to the moment in time when the inconsistent practice had occurred. In order to make that clear, he proposed amending the sentence so that it would read: "It might also be relevant to consider when the inconsistent practice occurred, in particular whether it lay in the past, after which consistency prevailed."

Mr. Murphy proposed that, in the second sentence of the paragraph, the word "large" should be replaced with the word "widespread", so as to mirror the wording of the draft conclusion.

Ms. Lehto said that the word "large" in that sentence referred to the number of States, which could not be qualified as "widespread".

Mr. Murphy, recognizing the problem pointed out by Ms. Lehto, suggested the deletion of the words "followed by a" and "number of States" in the second sentence, so that the sentence would read: "First, the practice must be sufficiently widespread and representative." Those deletions would require an amendment to the third sentence, namely replacing the words "such instances" with the words "the practice", which would also mirror the wording of the draft conclusion.

Paragraph (2), as amended by the Special Rapporteur and Mr. Murphy, was adopted.

Paragraph (3)

Mr. Murphy said that the example of "international canals" in the second sentence had been included to illustrate a kind of practice that might not be widespread, since not all States used international canals. Implicit in that example was the idea that customary international law governed interoceanic canals, such as the Suez, the Panama and the Kiel canals, although that idea might not coincide with the way the canal States viewed the regimes applicable to them. If the word "straits" was used in place of the word "canals", it might illustrate the point the Commission wished to make in a manner that was more pertinent to the topic. Such an amendment would require deleting the clause "of which there are very few", since there were many international straits.

Sir Michael Wood (Special Rapporteur) said that, although the example of international canals was a good one, he could see that it might imply that passage through such canals was governed by customary international law, which was probably not the case. He did not object to replacing the word "canals" with the word "straits" or deleting the phrase "of which there are very few". He proposed that, at the end of the sentence, the words "would necessarily be" should be replaced with the words "may well be", in order to more closely fit that example.

Mr. Saboia said that, although Mr. Murphy's proposal to replace "canals" with "straits" was apparently based on the fact that international canals were governed by treaties, there was nothing to prevent the application of customary international law to States that were not parties to those treaties but that were involved in some way with the practice concerned. He consequently saw no reason to delete the word "canals" and proposed, in fact, that the sentence should refer to both canals and straits.

Ms. Oral asked whether the reference to "international canals" in the second sentence referred only to the practice of coastal States or also to the practice of the users of international straits or canals. If it referred to the latter, then it involved the practice of a greater number of States.

Mr. Nolte said that it had always been his understanding that the international status of canals was established by treaties among a certain limited number of States but that those treaties sometimes contained a clause stating that the canal in question should be open for use by the ships of all other States. Other States that used such canals therefore did so on the basis of a right conferred on them by treaty, not under rules of customary international law. He consequently shared Mr. Murphy's concern about not giving the impression in paragraph (3) that international canals operated on the basis of customary international law.

Sir Michael Wood (Special Rapporteur) said that he recognized the difficulty posed by the reference to "international canals" and could see potential difficulties with "international straits" as well. Perhaps it would be best not to provide any example at all in that instance. He proposed to reformulate the second sentence to read: "As regards diplomatic relations, for example, in which all States regularly engage, a practice may have to be widely exhibited, while with respect to some other matters, the amount of practice may well be less."

Paragraph (3), as amended by the Special Rapporteur, was adopted.

Paragraph (4)

Mr. Tladi said he wished to propose a number of amendments about which he felt particularly strongly. The first proposal was the deletion of the phrase "and major shipping States" in the second sentence. The second proposal was to move the final sentence of footnote 54 to the end of paragraph (4), since all the Commission members who had spoken in plenary meetings in favour of the insertion of a reference to the doctrine of "specially affected States" had agreed that it had nothing to do with a State's power. That being the case, it should be reflected in the text, not hidden in a footnote. His third proposal was to add the words "It should be made clear, however, that" to the beginning of that new sentence so that it would read: "It should be made clear, however, that the term 'specially affected States' should not be taken to refer to the relative power of States."

Mr. Hmoud said that he supported Mr. Tladi's proposal and agreed that the basis for recognizing the status of "specially affected States" was not the power of States.

Mr. Park said that he supported Mr. Tladi's proposal to delete the phrase "major shipping States". However, in the last sentence of footnote 54, he had some doubts about the meaning of the words "relative power of States" since it was unclear what kind of power was meant. If there was no consensus among Commission members as to the meaning of the word "power" in that sentence, he would be opposed to moving it to the end of paragraph (4).

Mr. Nolte suggested that the insertion of the words "as such" between the words "not" and "be" in the final last sentence of footnote 54 might reconcile the views expressed by Mr. Park and Mr. Tladi. It would also clarify that the doctrine of "specially affected States" had nothing to do with power, while nevertheless indicating that it could not be excluded that, in specific cases, States possessing varying degrees of power might have the status of "specially affected States". With regard to Mr. Tladi's proposal to delete the phrase "and major shipping States", he wondered whether it might be sufficient to delete only the word "major".

Mr. Murphy said that he would like to know the reason for Mr. Tladi's suggestion to delete the phrase "and major shipping States". In principle, he had no objection to moving the last sentence of footnote 54 up to the text of paragraph (4), since its position was merely a question of emphasis. He would also like to know the reason for Mr. Tladi's proposal to insert the words "It should be made clear, however, that" at the beginning of the sentence, as opposed to transposing the sentence as it currently stood. As to Mr. Nolte's proposal to insert the words "as such", he was uncertain that it would address Mr. Park's concern. In his view, the purpose of that sentence was to indicate that the doctrine of

"specially affected States" meant that the practice of certain States in certain situations was of greater relevance than that of others, which had nothing to do with the relative power of States.

Mr. Reinisch said that there was merit to moving the last sentence of footnote 54 to paragraph (4). There was also merit to inserting the words "as such" in the sentence, since, although there could be situations in which a State's power was one of the reasons for considering it to be a "specially affected State", the Commission was attempting to indicate that, in other situations, it was a totally irrelevant criterion.

He, too, did not understand the reason for Mr. Tladi's proposal to delete the phrase "and major shipping States", as it seemed that both sets of examples given in the second sentence were perfectly acceptable.

Mr. Tladi said that it had been clear from the Commission members' statements delivered in plenary that the doctrine of "specially affected States" had nothing to do with power. The insertion of the words "as such" would reverse that position, giving the impression that the International Law Commission had not completely excluded the possibility that a State's power might give it the status of a "specially affected State". Even if the factors that qualified a State as "specially affected" flowed from its power, it was those factors that afforded it that status, not its power.

In response to Mr. Murphy's questions, the reason for his proposal to insert additional text at the beginning of the final sentence of footnote 54 was to emphasize that the Commission did not align itself with the mistaken view that the criterion for determining whether a State was "specially affected" was its relative power. And he had proposed the deletion of the words "and major shipping States" from the second sentence because he wished to make a broader point about the examples provided in paragraph (4), which was that, although the States referred to in those examples could be considered "specially affected States", other States could also be considered "specially affected", only affected in a different way. He was not opposed to finding another example to replace that of "major shipping States".

Mr. Saboia said that he shared many of the concerns expressed by Mr. Tladi and had expressed them in his statement in plenary meetings of the Commission and also in the Drafting Committee. He found it unacceptable that States that were unable to participate in the activity or practice that served as a basis for identifying a rule of customary international law for reasons relating to such factors as their geography or their lack of technology tended to be placed at the opposite extreme of States that had participated directly in it, even though they might have expressed opinions or taken part in discussions about regulating the activity in question. In his statement, he had cited as examples issues relating to outer space and the treaties that regulated activities there, which were very much of concern to all States. The same could be said of issues relating to the use of force. The Commission thus had to be careful to avoid any implication that the practice of States that had not been directly involved in the relevant activity was to be marginalized. Mr. Tladi had raised an important point, and the Commission should attempt to find a satisfactory solution for it in paragraph (4).

Mr. Rajput said that he agreed with most of what Mr. Tladi had said. With regard to the reference to "major shipping States" in paragraph (4), if a State was involved in shipping, then it was its practice that mattered, irrespective of whether it was a major or minor shipping State. By attempting to emphasize the role of major shipping States, the Commission was tipping the balance in a certain direction. The best way to deal with the situation would be to drop the reference to "major shipping States" altogether, as Mr. Tladi had proposed, or else simply to delete the word "major".

He supported Mr. Tladi's proposal to move the last sentence of footnote 54 up to the text of the commentary with the additional wording at the beginning of the sentence. With regard to Mr. Park's comment concerning the expression "relative power", the point that was intended to be captured was precisely that power could take various forms, and the Commission wanted to make it very clear that, irrespective of the form of power a State possessed, the relative strength of a State was inconsequential when it came to the concept of "specially affected States".

Ms. Oral said that she was not entirely opposed to the inclusion of the words "major shipping States" since the International Maritime Organization (IMO) used shipping tonnage as a basis for its practice, thus taking major shipping States into account differently from others. She was concerned that the use of the expression "shipping States" without the word "major" might have the effect of including the practice of States engaged in substandard shipping. The Commission should be cautious when getting into the area of shipping in general.

One example that raised questions about the operation of the doctrine of "specially affected States" was that of a State conducting military activities in an exclusive economic zone. It was difficult to know, in that example, whether the "specially affected State" was the coastal State or the State conducting the military activities, and the respective views of such States were probably quite different. That was an example in which the question of power could be relevant. That said, she still had a problem with the doctrine of "specially affected States", as she had indicated in her statement on the subject, given that the Commission was extrapolating to very broad areas on the basis of one case that referred to that concept.

Mr. Murphy said that he could endorse Mr. Tladi's proposal to move the final sentence of footnote 54 to the text of paragraph (4), and he could go along with the additional wording he had proposed at the beginning of that sentence, even though he did not see the importance of it. There was a technical problem, however, with deleting the words "and major shipping States" from the second sentence of paragraph (4), as the sentence contained a reference to maritime zones, which included the high seas. It was not obvious why coastal States would be relevant in that context, and the Commission would have to find a solution if those words were deleted. He suggested that the phrase "flag States" might work as a replacement for "shipping States". The top ten flag States were not the powerful States, and the use of that example would point to a scenario in which the practice of a group of States clearly needed to be taken into account in the area of navigation on the high seas.

Mr. Park said that he was unhappy with the term "flag State", owing to the use of flags of convenience. He therefore agreed with Ms. Oral.

Ms. Oral said that some of the top ten flag States might not offer examples of best practice. For that reason, the expression "major shipping States" would be preferable.

Mr. Nolte said that one of the purposes of the commentaries was to supply illustrative examples. In order to obviate any suggestion of power relations, it might be advisable to replace "major shipping States" with "relevant shipping States", in other words shipping States of relevance to the rule

Mr. Rajput agreed with Mr. Murphy that the paragraph could not refer only to the practice of coastal States. However, the term "flag State" created a huge problem owing to the registration of vessels under flags of convenience. One solution might lie in simply dropping the adjective "major".

Ms. Escobar Hernández said that she was not in favour of replacing the phrase "major shipping States" with "flag States" on account of the use of flags of convenience and the reluctance of international courts to give a ruling on that institution which in practice gave rise to many problems.

Mr. Park proposed the deletion of the words "major shipping States" and the redrafting of that part of the sentence to read "coastal States, including archipelagic States".

Mr. Tladi said that Mr. Park's proposal would not work in the context in question. It might be better to speak of "relevant coastal States and flag States".

The Chair said that he had noted some opposition to the term "flag State".

Mr. Ruda Santolaria said that he would prefer to retain the notion of "shipping States".

Mr. Rajput said that he could not agree to either the expression "archipelagic State", because it was too narrow, or the term "flag State", because it posed a host of problems. It

would therefore be wise to keep to generic terms such as "shipping States" or "navigating States".

Mr. Nguyen said that, in view of IMO standards, a reference should be made to tonnage.

Mr. Ouazzani Chahdi said that the term "flag State" necessarily encompassed States offering flags of convenience and, for that reason, the original expression "major shipping States" should be retained.

Mr. Šturma said that what was important was that a sentence from the footnote had been moved to the main text of the paragraph. Perhaps it would be apt to delete the word "major" and insert the word "relevant" in the final sentence, which would then read "practice of the relevant coastal States and shipping States".

Ms. Oral said that shipping, which was highly regulated by IMO, might not be the best example of practice in the context of customary international law. Mr. Murphy was right that the usual term was "flag State" but talking about flag States without any reference to IMO standards might raise complex issues which went beyond the scope of the commentary.

Mr. Murphy said that in fact what the Commission was trying to do was to capture a well-balanced rule relating to navigation in maritime zones. He was therefore in favour of the phrase "practice of the relevant coastal and flag States", as there was nothing sinister about the concept of a flag State and the term "shipping State" did not appear anywhere in the United Nations Convention on the Law of the Sea.

Sir Michael Wood (Special Rapporteur) said that he agreed with the language suggested by Mr. Tladi, as "flag State" was the term used throughout the United Nations Convention on the Law of the Sea.

The Chair, speaking as a member of the Commission, said that the Commission should indeed abide by the terminology of the United Nations Convention on the Law of the Sea.

Mr. Rajput said that the term "flag State" had too many implications that went beyond navigation in a maritime zone.

The Chair invited the Special Rapporteur to express his opinion.

Sir Michael Wood (Special Rapporteur) said that the adjective "relevant" qualified both coastal States and flag States. The reference was therefore clear and was good legal language taken from the United Nations Convention on the Law of the Sea.

Paragraph (4), as amended by Mr. Tladi, was adopted.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were adopted.

Paragraph (8)

Mr. Murphy said that, in the second sentence, "and/or" should simply read "or".

Paragraph (8), as amended, was adopted.

Paragraph (9)

Paragraph (9) was adopted.

The commentary to draft conclusion 8 as a whole, as amended, was adopted.

Part Four (Accepted as law (opinio juris))

The chapeau to Part Four was adopted.

*Commentary to conclusion 9 (Requirement of acceptance as law (*opinio juris*))*

Paragraphs (1) to (6)

Paragraphs (1) to (6) were adopted

The commentary to conclusion 9 as a whole, was adopted

*Commentary to conclusion 10 (Forms of evidence of acceptance as law (*opinio juris*))*

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

Mr. Park said that the meaning of the sentence beginning with the words "Similarly, the effect of practice …", was unclear and that the sentence should therefore be deleted.

Sir Michael Wood (Special Rapporteur) said that the sentence made the simple proposition that, if a statement were made to the effect that a practice which was seemingly in line with an emerging or alleged rule was not in fact in accordance with that rule, that statement nullified the effect of the practice. The example given in footnote 72 provided all the necessary clarification.

Mr. Nolte said that he agreed with the Special Rapporteur. The sentence was useful. Perhaps the explanation could be expanded by adding at the end of the sentence the words "or that the practice is not pursuant to the alleged rule". Sometimes a State which made an *ex gratia* payment, for example, did not do so pursuant to a particular rule.

Mr. Tladi said that he was in favour of retaining the sentence.

Mr. Ruda Santolaria said that he too supported retaining the sentence in question.

Paragraph (4) was adopted.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were adopted.

Paragraph (8)

Sir Michael Wood (Special Rapporteur) said that, in light of a discussion which he had had with Mr. Nolte, he suggested that, in the last sentence, the phrase "its perceived silence" should be changed to "its inaction".

Paragraph (8), as amended, was adopted.

The commentary to draft conclusion 10 as a whole, was adopted.

Part Five (Significance of certain materials for the identification of customary international law)

Commentary

Sir Michael Wood suggested the deletion of the word "commentary" in line with the practice followed elsewhere in the draft text.

It was so decided.

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Park, supported by **Mr. Saboia**, said that, in the last sentence, it would be advisable to delete the phrase "the extent to which the Commission is engaged in

progressive development of the law", because it created the wrong impression that there was a hierarchy in the Commission's work of codifying and progressively developing international law. During the late 1950s, when the Commission had been dealing with the law of the sea, it had abandoned the distinction between codification and progressive development. The phrase in question was reintroducing it. Whether the Commission's output constituted codification or progressive development was a very complex issue often involving a large amount of subjective judgment. Moreover, the evolutive nature of international law meant that, in some cases, work which had once represented progressive development of international law had ultimately become codification.

Mr. Nolte said that the Commission could not abolish the distinction between codification and progressive development of international law with the stroke of a pen even if, in the past, when the Commission had been drafting certain treaties, it had not considered it necessary to specify whether or not their contents reflected existing customary international law. The whole purpose of the identification of customary international law was to determine what was or was not law. Given that in 2017 the overwhelming majority of States represented in the Sixth Committee had insisted on drawing that very distinction in the debate on the topic of immunity of State officials from foreign jurisdiction, it would be fundamentally wrong to undermine that distinction in the paragraph under consideration. The sentence at issue was therefore appropriate and should be retained, otherwise the Commission would give the erroneous impression that it considered that the distinction between progressive development and codification was irrelevant and could be disregarded.

Mr. Rajput said that the reference to progressive development was extremely important and should therefore be maintained. It did not in any way interfere with the Commission's methodology and clearly indicated that, when there was a dearth of practice, the Commission's work did not constitute codification of something which could be termed customary international law. In that connection, he recalled the definition of progressive development contained in article 15 of the statute of the International Law Commission.

Mr. Tladi said that while the distinction between codification and progressive development was important, and progressive development should not be viewed as the lesser of the two, he opposed the idea of referring specifically to either in the output of the Commission's work. Mr. Rajput's point was valid, but the key indicator as to whether the Commission was engaged in codification or progressive development should be the sources upon which it relied in a given case. He therefore supported Mr. Park's suggestion to delete the phrase in question, albeit for slightly different reasons.

Mr. Murphy said that the issue went deeper than the sources that the Commission used in its work. On occasion, such as in drafting the 2011 articles on the responsibility of international organizations, it had had cause to indicate that it was engaged in progressive development, even if not explicitly. The key element of the phrase under discussion was the words "the extent to which". The credibility and legitimacy of the Commission turned on the degree to which it was conscious of engaging in progressive development and how it ensured transparency in that regard. Consequently, he favoured retaining the phrase.

Mr. Vázquez-Bermúdez echoed calls for the phrase to be deleted. The Commission's work was generally a mixture of codification and progressive development; its authority depended greatly on the sources it used and the extent of its research, but States' reception of its output ultimately served as the best test.

Mr. Nolte said that it could be difficult for those identifying norms of customary international law to judge the Commission's output on the basis of how it was received by States, the pronouncements of which were not always clear. As a compromise, he suggested altering the phrase to read "the extent to which the Commission is engaged in proposing new law".

Mr. Park said that he could not accept that suggestion: it was not the Commission's mandate to propose new law. The subjective nature of the phrase under discussion was of particular concern given that, in many cases, it would be domestic judges relatively unfamiliar with international law and the work of the Commission who would find themselves attempting to decide whether the Commission had been engaged in codification or progressive development on a particular topic.

Ms. Lehto said that the phrase was being read in the broader context of the discussion concerning the Commission's mandate and whether it should indicate that it was engaged in codification or progressive development in any given instance. Although the phrase was not without purpose in respect of the identification of customary international law, it was tautological and unnecessary, giving rise to more misunderstandings than it clarified, and should be deleted.

Ms. Escobar Hernández, agreeing that that phrase created more problems than it solved and should be deleted, said that mentioning only one of the two equal elements of the Commission's mandate would require the Commission to embark on a prolonged debate as to the nature of that mandate, which was neither procedurally desirable nor opportune. The phrase might suggest to the outside reader that the Commission considered progressive development subsidiary to and less important than codification, which was surely not the Special Rapporteur's intention; moreover, the reference earlier in the paragraph to the sources relied upon by the Commission already served to clarify what weight should be given to the output of the Commission's work.

Mr. Cissé said that, as the phrase was logical and merely reflected the Commission's mandate, it could safely be retained. The debate should not be further prolonged.

Mr. Ruda Santolaria, echoing calls for the debate to be curtailed, said that the phrase could be deleted as the paragraph would be clear without it.

Mr. Murphy, observing that any reference to progressive development seemed problematic, suggested instead that the phrase be altered to read "the way in which the Commission characterizes its work". In some cases, the Commission stated explicitly that it was dealing with customary international law, which was an important factor in identifying such norms.

The Chair recalled that the Commission had yet to take a general decision on characterizing the output of its work as the result of codification or of progressive development. When preparing the draft articles that had become the 1969 Vienna Convention on the Law of Treaties, for example, no such characterization had been used.

Mr. Grossman Guiloff, acknowledging the importance of the points that Mr. Murphy had raised, said that they merited a dedicated, in-depth discussion at a future session of the Commission, the outcome of which should not be prejudged.

Mr. Saboia said that the Commission should avoid labelling its work and its output. During the drafting process, it was not always clear what form that output would eventually assume; even once adopted, commentators were sometimes hesitant to describe it as the result of a codification exercise.

Mr. Vázquez-Bermúdez said that, as the paragraph already made it clear that not all determinations of the Commission carried the same weight, there was no need for a specific reference to progressive development.

Mr. Nolte said that the discussion need not be prolonged if the Commission were to proceed on the understanding that deleting the disputed phrase would in no way prejudice any future debate on whether it should explicitly characterize its work and output as codification or progressive development, particularly in cases where States sought its views on whether a norm was one of customary international law. If that were the case, he could agree to the deletion of the phrase.

Mr. Petrič, welcoming Mr. Nolte's suggested course of action, said that codification and progressive development were intertwined in the work of the Commission, although exactly how they were combined would differ from topic to topic. The Commission had traditionally been reluctant to state whether it was engaged in codification or progressive development, but if States wished to know whether a particular provision reflected customary international law and a clear answer could be given, the Commission should give it.

The Chair said that an in-depth debate on the issue would be needed in due course; without prejudice to that debate, the Commission could proceed as suggested, particularly

given that the list in the last sentence of the paragraph was introduced by the word "including", making it non-exhaustive.

Sir Michael Wood (Special Rapporteur), expressing surprise at the direction the discussion had taken, said that it had not been his intention to stimulate a debate on fundamental issues relating to the Commission's work. While it seemed to him obvious that knowing whether the Commission had been engaged in progressive development or codification was the starting point for making use of its determinations in identifying rules of customary international law, that point emerged clearly from the rest of the paragraph. He therefore had no objection to deleting the phrase in question.

The Chair said that he took it that the Commission agreed to delete the words "the extent to which the Commission is engaged in progressive development of the law" from the last sentence of paragraph (2).

Paragraph (2), as amended, was adopted.

The commentary to draft conclusion 10 as a whole, as amended was adopted.

Commentary to draft conclusion 11 (Treaties)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Tladi suggested that the words "correspond to", in the first sentence, should be replaced with "reflect".

Mr. Nolte said that the words "may also be of relevance", in the last sentence, suggested that the attitude of States that were not party to a widely ratified treaty would not always be relevant in establishing whether the treaty reflected customary international law. Unless the Special Rapporteur could provide examples of when that might be the case, he would prefer the words "may also be" to be changed to "will also be".

Mr. Tladi said that examples could be found, however unlikely; nevertheless, he did not object to Mr. Nolte's suggestion, despite the fact that it appeared somewhat inconsistent with the Commission's earlier discussion.

Mr. Murphy expressed support for both the amendments suggested.

Sir Michael Wood (Special Rapporteur), echoing Mr. Tladi's comments, agreed to both the suggested amendments.

Mr. Grossman Guiloff, referring to the penultimate sentence of the paragraph, sought clarification of the connection between the mention of treaties adopted "without opposition" and the reference given in footnote 83, which concerned a treaty adopted by an overwhelming majority of States.

Sir Michael Wood (Special Rapporteur) said that mentioning both treaties adopted without opposition and treaties adopted by an overwhelming majority of States could be helpful to those who might come to apply the draft conclusions in practice. The adoption of a treaty without opposition was a significant factor in the identification of customary international law.

With that explanation, **the Chair** said that he took it that the Commission agreed to retain the words "without opposition" and to accept the two amendments previously suggested.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

The meeting rose at 6 p.m.